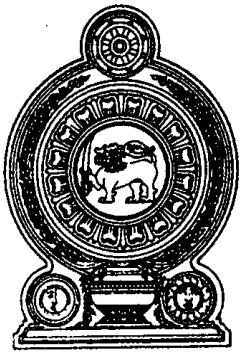

THE

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DIGEST

JAYAWARDANA AND TWO OTHERS V. DISSANAYAKE AND SEVEN OTHERS

SUPREME COURT
MARSOOF, PC, J.
SRIPAVAN, J. AND
EVA WANASUNDERA, PC. J.
S.C.F.R. APPLICATION NO. 231/2012
OCTOBER 30TH, 2013

Constitution – Article 12(1) – All persons are equal before the law and are entitled to the equal protection of the law. - Residency? Unlawful occupation of State land - School admission.

The 3rd Petitioner, the minor child was not admitted to D. S. Senanayake College on account of the Petitioners' residence being situated on State land. The 1st Petitioner, the father of the child affirmed in his affidavit that 30 years ago he was born in the residence that the Petitioners are living at present.

The interview board that selected entrants to grade one of the school in terms of Circular No. 2011/18 dated 11.5.2011 formed the opinion that the Petitioners' residence being situated on a State land amounts to 'unlawful occupation of State Land'.

Held:

(1) "The 'residency' in the Circular should not be interpreted as lawful or unlawful because it is not a subject matter for the interview board. If the fact that the child is 'resident' within the area in terms of the Circular for the relevant period is proved, then the child should be admitted to school under clause 6.1 of the Circular and marks should be given accordingly".

Per Eva Wanasundera PC J.

"Circulars are not made for particular cases but for the society in general. The object of every court is to do justice within the circular"

APPLICATION under Article 12 (1) of the Constitution

Senure Abeywardene for Petitioners
Ms. Viveka Siriwardane, S. S. C. for Respondents

Cur.adv.vult.

December 18, 2013

EVA WANASUNDERA, PC, J.

The Petitioners are the parents of a minor child and the minor himself. They have come before this Court alleging that the fundamental right guaranteed to them under Article 12(1) of the Constitution of the Democratic Socialist Republic Sri Lanka has been violated by the Respondents.

Article 12(1) stipulates that all persons are equal before the law and are entitled to the equal protection of the law.

At the stage of hearing of this case, the main argument was that the 3rd Petitioner, the minor child was not admitted to D. S. Senanayake College on account of the Petitioners' residence being situated on the State Land. This state of affairs was described as "unlawful occupation of state land" by the interview board that selected entrants to grade 1 of the school in 2012, in terms of Circular No. 2011/18 dated 11.5.2011.

The 1st Petitioner, the father of the child has affirmed in his affidavit that 30 years ago he was born in the same residence that they are living at present. The 1st Respondent has along with his objections dated 2nd July 2013 filed a copy of the Birth Certificate of the 1st Petitioner, the father of the child, which was produced at the interview for admission of the child marked as 1R2B, and states that the address in that Birth Certificate is not the same as that averred in the petition. However, I note that in cage 9 of the said birth certificate, the address of the informant, the father of the 1st Petitioner is mentioned, as Maitland Lane, Colombo 7. The

number of the house is not legible but the place is the same as at present. I am of the view that the 1st Petitioner's Birth Certificate is proof of the fact that he was living in Maitland Place, Colombo 7 from his birth. His marriage certificate dated 28.10.2005 and the 3rd Petitioner child's Birth Certificate also show that the family has been living at 55/2, Maitland Place, Colombo 7. The other documents such as electoral lists and electricity bills confirm the fact that the parents of the child have been living continuously at 55/2, Maitland Place, Colombo 7.

Clause 6.1 of the Circular No. 2011/18 stipulates that 50 marks would be awarded to a child who is a resident in the feeder area of the school. The record of marks given at the interview to the Petitioners was produced by the Respondents marked 1R3 and the fact that 78 marks was awarded at the interview to the 3rd Petitioner is recorded and signed by all the members of the interview board as well as the father of the child, the 1st Petitioner having accepted the marks. Thereafter for no reason indicated by the Respondents to the petitioner, the child's name was not included in the temporary list of children to be admitted to Grade 1 in 2012. Admittedly other children who were awarded below 78 marks have got selected. This fact is confirmed by 1R4 which shows the list to be admitted. The only reason given by the Respondents as put forward, only at the hearing of this application is that, the occupants of the residence were in "unlawful occupation of state land."

I believe that if the word "resident" in the circular is to be interpreted as 'lawfully resident' as submitted by the Learned Senior State Counsel, children belonging to the poorer segment of society, living in State Land for a very long period will be deprived of education. Circulars are not made for particular

cases but for the society in general. The object of every Court is to do justice within the circular. The word "lawfully" does not appear in the circular; it is an interpretation suggested to Court by the Learned Senior State Counsel on behalf of the school. It is my considered view that respect must be paid to the language used in the circular, and the traditions and usages which have given meaning to that language. Article 126 of the Constitution too imposes a duty to make an order which is just and equitable. It is not for this Court to decide on whether those who are permanently living within the feeder area are occupying their houses lawfully or not. In the instant case the Petitioners are occupying State Land. This is not the only family in Maitland Place in occupation of State Land. In fact the electoral lists show a large number of residencies in 55/2, Maitland Place. All of them are occupying State Land. If the authorities have failed and neglected to evict them from State Land for a long period, it may be that they have been occupying the land for over one third of a century or so, which by itself could confer dominium over land. Whether such person can be evicted or not is a different matter altogether. The fact is that they are 'resident' within the feeder area of the school, and have not been evicted for an extremely long period of time. Are the children in these families to be deprived of their right to education? I am of the opinion that residency in the circular should not be interpreted as lawful or unlawful because it is not a subject matter for the interview board. If the fact that they are resident within the area for the relevant period is proved, then the child should be admitted under Clause 6.1 and given marks accordingly. The interview board has correctly done so giving 78 marks, as explicitly shown in 1R3 which the Respondents have filed in Court but later decided not to admit the child on the ground

of unlawful occupation of State Land. The Respondents at no time informed the Petitioners of this reason until this application was filed. The 1st and the 2nd Petitioners have been prevented from admitting the 3rd Petitioner to D. S. Senanayake Vidyalaya by reason of arbitrary and unreasonable conduct by the Respondents which violates the fundamental rights of the Petitioners guaranteed in terms of Article 12(1) of the Constitution.

I therefore direct that the 3rd Petitioner, Oshadha Randika Kayawardane, who is the child of the 1st and 2nd Petitioners should be admitted to Grade 3 of the D. S. Senanayake Vidyalaya at the beginning of the year 2014. The Petitioners shall be entitled to Rs. 30,000/- (Thirty Thousand Rupees) as costs payable by the State.

MARSOOF, PC, J. – I agree.

SRIPAVAN, J. – I agree.

Application allowed.

LIYANAGE & ANOTHER VS RATNASIRI – DIVISIONAL SECRETARY, GAMPAHA & OTHERS

SUPREME COURT
TILAKAWARDENA J
SATHYA HETTIGE PC J.,
DEP PC J.,
SC F R 121/2012
DECEMBER 7, 2012
JANUARY 10, 2013
MARCH 8, 2013

Constitution Article 126 – Time Bar – Imperative – Suppression of material facts fatal - Failure to observe uberrima fides – Vigilantibus Non Dormientubis Jura Sub – Vernieunt – Impotentia excusat legem - Uberrimafides.

The Petitioners complained that their Fundamental Rights were infringed by appointing the 7th Respondent to the post of Registrar of Births and Marriages, Hendala Division. The Respondent contended that the application is out of time and the Petitioners are guilty of suppression and misrepresentation of material facts – Thereby failing to act with uberrima fidei. On the preliminary objection taken –

Held:

(i) The Supreme Court has consistently held in a number of cases involving alleged violation of fundamental rights that the time limit within which an application should be filed is mandatory;

(ii) This is a constitutional mandate. The well known principle of *vigilantibus Non Dormantibus Jura Subveniunt* – law assists those that are diligent not those who sleep over their rights – is applicable;

(iii) It is now a well established principle that when an applicant has suppressed or misrepresented the facts material to an application and when there is no complete and truthful disclosure of all material facts, the Court will not go into the merits of the relevant application, but will dismiss it *in limine*. . .

per Sathya Hettige P.C, J.

> "These Petitioners have failed and neglected to tender a material document–namely, his application for the post of Registrar to Court. Court holds that there was a deliberate suppression and there has been no complete disclosure.

AN APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Jayasinghe vs The National Institute of Fisheries and Nautical Engineering* (NIFNE) and others – 2002 1 Sri L.R. 27
2. *Revici vs Prentice Hall Incorporated and others* – 1969 1 All ER 772
3. *G. S. Premachandra & another vs University Grants Commission and 10 others* – SCFR 573/2004;
4. *S. A. B. Senanayake vs University Grants Commission* – SCFR 574/2004;
5. *Edirisuriya vs Navaratne* – 1985 1 Sri L.R. 100;
6. *Eager vs Furnivall* – 17 ch D 115;
7. *Blanca Diamond (Pvt) LTD v. Wilfred Van Els & Two others* – 17 ch D 115;
8. *Alphonso Appuhamy vs. Hettiarachchi* – 73 NLR 131;
9. *Gas Conversions (Pvt) Ltd., and 3 others vs Ceylon Petroleum Corporation and others* – SCFR91/2002 at 4;

Mangala Niyarepola with *Edward Samarasekara* for the Petitioners

Suren Gnanaraj S. C. for the 1st – 6th and 8th Respondents

Sanjeewa Dissanayake for the 7th Respondent

June, 20, 2013

SATHYA HETTIGE P.C.J.

The petitioners in this application filed under Article 126 of the Constitution of Sri Lanka, were the applicants for the post of Registrar of Births and Deaths for Hendala Division and Marriages (General) for the Southern Aluthkuru Korale Division in the District of Gampaha and alleged that their

fundamental rights were infringed by the actions of the 1st to 6th respondents by appointing the 7th respondent for the said post. The petitioners also sought a direction from the court cancelling the appointment of the 7th respondent and appoint any one of the petitioners whose names appeared in the notice dated 14.06.2011 (P4) to the said post except Pelihawadana Arachchige Bernard Cyril Perera Jayawardane who did not attend the interview on 01.07.2011.

The court granted leave to proceed on the alleged violation of Article 12(1) of the Constitution on 30th May, 2012.

When this matter was taken up for hearing on 7th December 2012 the respondents raised two preliminary objections on the maintainability of the application as follows:

1. That the petitioners' application was out of time in terms of Article 126 (2) of the Constitution as the application of the petitioners has not been filed within one month of the alleged infrigement.

2. The petitioners were guilty of suppression and misrepresentation of material facts, thereby failing to act with *uberrima fides*.

After hearing all the parties on the preliminary objections the court directed the parties to file written submissions within six weeks and reserved the judgment. However, the petitioners have failed to file written submissions as directed. Nevertheless this court has examined and considered all pleadings and documents filed in court.

Article 126 (2) of the Constitution stipulates that if a person alleges that any fundamental right or language right

has been infringed or that it is about to be infringed by executive or administrative action that person by himself or through his Attorney–at law must apply to the Supreme Court within one month from such infringement seeking relief (emphasis added).

The Article very clearly refers to a time frame within which such complaint should be made to the Supreme Court.

The Article 126 (1) reads as follows:

"The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

Article 126 (2) provides that *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney-at-Law on his behalf, within one month thereof in accordance with such rules of Court as may be in force, apply to the Supreme Court by way petition in writing addressed to such court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges".*

In paragraph 6 of the petition the petitioners have stated that on the 17.10.2011 they came to know that the 7th respondent had been appointed to the post and was functioning from an office located at No. 34/23.Paranawatta Road,

Kerawalapitiya, Hendala, Wattala. The petitioners filed this application in the Supreme Court registry only on 19th March 2012 after about five months lapse, despite admitting to have been aware of the 7th respondent's appointment.

It must be stated that the Supreme Court has consistently held in a number of cases involving alleged violation of fundamental rights that the time limit within which an application for relief for any fundamental right or language right violation may be filed is mandatory and must be complied with.

It can be seen that this is a Constitutional mandate. On the facts of this case it can also be said that the well known Latin maxim regarding doctrine of Prescription in Roman Law ***"Vigilantibus Non Dormientibus Jura Subveniunt"*** which means ***"the laws assist those who are vigilant, not those who sleep over their rights"*** is applicable. (emphasis added)

The court finds that the petitioners in this application have been negligent for a long period of time in instituting this application. When an appointment of a public servant is being challenged the aggrieved party must come before the court within the time limit prescribed by the law without unreasonable delay. The petitioners have not explained the delay and not even taken the opportunity given by court to explain the delay by filing written submissions on the preliminary objections and the merits of this application as directed by the court.

The petitioners in this application have taken up the position that this is a case where there was continuing violation of their fundamental rights.

The learned counsel for the 7th respondent and the learned State Counsel cited the judgment of *Jayasingha v. The National Institute of Fisheries & Nautical Engineering (NIFNE) & Others*[1] wherein it was held that ***"The documentary evidence showed that several months prior to 15.12.2000 the date of the petitioner's application, he was aware of the appointment of the 18th respondent as DGM of NIFNE. Hence the petitioner's application was time barred".***

In *Revici v. Prentice Hall Incorporated and Others*[2] Denning M.R. at 774 Edmund Davies, L.J. and Widgery, L.J. agreeing

". . . . Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. . . ."

In the cases of *G. S. Premachandra & Another v. University Grants Commission and 10 others* [3] and *S.A.B. Senanayake v. University Grants Commission,*[4]

former Chief Justice Dr. Bandaranayake J (as she then was) held that

"The time limit specified in terms of Article 126(2) of the Constitution that a petitioner must come before the Supreme Court within one month from the alleged infringement or imminent infringement is mandatory. However, the Supreme Court could exercise its discretion in a fit manner provided that a petitioner has submitted adequate reasons or an excuse for the delay in presenting his petition."

It is important to note that the party who alleges any violations of his fundamental rights must exercise due degree of vigilance and caution and it can be seen that the use of legal diligence without long and unreasonable delay is always fovoured by the courts of justice.

In *Edirisuriya v Navaratnam* (5) the court has reiterated the fact that the time limit of one month under Article 126(2) of the Constitution is mandatory but however, the court said that the court has a discretion to entertain an application made out of time in a fit case in that the petitioner must adduce reasons for the delay. It appears that this basic principle is based on the Latin maxim *"impotentia excusat legem"* which means that where the law creates a duty or charge and the party is unable to perform due to no fault on his part the law excuses him. (*Eager v Furnivall* (6))

Now I will briefly state the facts in considering the merits of this application in fairness to all parties despite the application being instituted out of time.

Pursuant to a notice published in the Gazette by the 4th respondent applications were called for the post of Registrar of Births and Deaths of the Hendala division and Marriages (General) for the Southern Aluthkuru Korale division, within the Divisional Secretariat Division of Wattala in the Gampaha District. It appears that 10 applicants including the petitioners and the 7th respondent applied for the said post and the interview was conducted on the 1st of July 2011 by an Interview Panel in respect of 8 applicants including the petitioners and the 7th respondent. At the said interview the 7th respondent obtained highest marks and the mark sheet marked 2R3 was annexed to the affidavit of the 2nd respondent. The 7th

respondent was accordingly appointed to the said post by the 4th respondent with the approval of the 6th respondent with effect from 18th November 2011.

However, the petitioners lodged a complaint protesting against the appointment of the 7th respondent on the 22nd November 2011 on the basis the 7th respondent's name did not appear in the notice marked P4 to the petition and therefore 7th respondent was not eligible to be considered for appointment.

Thereafter, the 4th respondent published a notice marked P7 giving the public an opportunity to lodge any objections to the 7th respondent's appointment requiring them to be present at an Inquiry. Accordingly the petitioners lodged their objections and inquiry was conducted on 9th May 2012. However the petitioners failed to be present at the said inquiry and establish their complaint in support of the objections by producing any oral or written material.

On perusal of the written submissions filed by the State it appears that in fact the Grama Niladari 171 Kerawalapitiya and Grama Niladari 171 A Matagoda and 7th respondent had been present and given written statements in response to the objections (2R9a, 2R9b and 2R9c). After the inquiry it had been found that the objections were baseless and were accordingly rejected. It has also been found that the error by not including the name of the 7th respondent in the notice P4 had been a *bona fide* lapse which was discovered only after the interview was conducted, on the part of the typist who was assigned to prepare the notice. The court accordingly finds that no reasons are evident to justify this challenge of the appointment of the 7th Respondent.

Now I will deal with the next objection raised with regard to suppression and misrepresentation of material facts and documents.

The respondents submitted that the 1st petitioner was found guilty and fined in the Magistrate's Court of Wattala in MC case No. 38384 and had applied for the Post of Registrar and suppressed that fact and made false representations. The notice calling for applications very clearly had stated that any person who had been found guilty by a Court of law is not eligible to apply for the said post. The petitioner deliberately suppressed this information by avoiding the production of his application to court. The 7th respondent has annexed marked 7R1 the copy of the relevant case proceedings in support of that position. The respondents submitted that the material facts had been suppressed from court. This court finds that there is merit in the contention of the respondents that there has been deliberate suppression of facts.

The petitioners failed to participate at the inquiry held on 9th May 2012 into the objections raised by them against the 7th respondent's appointment despite the fact that they were granted an opportunity to do so. It appears that the petitioners failed to attend the inquiry into the objections filed by them and instead instituted these proceedings seeking reliefs alleging violations of fundamental rights. Did the petitioners in this application act with *Uberrima Fides*. In a number of judgments of this court the requirement of full disclosure of material facts was discussed and dealt with. The court has also enunciated the requirement to act with *Uberrima Fides* in respect of applications before court. The doctrine of complete and truthful disclosure will apply in situations where applications alleging infringement of fundamental rights are filed before court in terms of Article 126 of the Constitution.

In the case of *Jayasinghe v The National Institute of Fisheries and Nautical Engineering and Others (supra)* at 286 referred to by both the counsel for respondents, it was held that

> *"the conduct of the petitioner in withholding these material facts from court shows a lack of Uberrima fides on the part of the petitioner. When a litigant makes an application to this court seeking relief, he enters into a contractual obligation with the court. This contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from court. In the case of Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and two Others* [7] *the court highlighted this contractual obligation which a party enters into with the court, requiring the need to disclose Uberrima fides and disclose all material facts fully and frankly to court. Any party who misleads court, misrepresents facts to court or utters falsehood in court will not be entitled to obtain redress from court. It is a well established proposition of law, since the courts expect a party seeking relief to be frank and open with the court. This principle has been applied even in an application that has been made to challenge a decision made without jurisdiction. Further, court will not go into merits of the case in such situations. The failure to make a full and frank disclosure of all material facts renders this application liable to be dismissed."*

It is also noteworthy to refer to the case of *Alponso Appuhamy v Hettiarachchi*[8] wherein Pathirana J was of the view that *"when an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the court, before it issues notice in the first instance a full and truthful disclosure of all the material facts, the petitioner must act with Uberrima Fides."*

On perusal of the petition it can be seen that the petitioners' application is based on the fact that the petitioners possessed all the required qualifications to apply for the post of Registrar and the Notice marked P4 calling for applicants to be present at an interview did not disclose the three names including the name of the 7th respondent. However, on perusal of the material before court it can be seen that 4th respondent has remedied the mistake for which the petitioners positively reacted, by giving the petitioners and the general public a fair opportunity of objection to the appointment of the 7th respondent. The petitioners did not proceed with the complaint and or participate at the inquiry to which the petitioners were invited.

I will refer to the Supreme Court case of *Gas Conversions (Pvt) Ltd and 3 Others v Ceylon Petroleum Corporation & 3 Others*[9] Dr. Bandaranayake J (as she then was) dealt with a similar situation wherein several preliminary objections were raised on misrepresentations and suppression of material facts and failure to observe *Uberrima Fides.* (emphasis added)

"A series of judgments of our courts have enunciated the requirement of 'complete disclosure' and uberrima fides with regard to the applications before Court. It is now a well established principle that when an applicant has suppressed or misrepresented the facts material to an application and when there is no complete and truthful disclosure of all material facts the court will not go into merits of the relevant application, but will dismiss it in limine. . .".

It must be stated that when the court considers applications on fundamental rights made under Articles 17

and 126 of the Constitution the court has an onerous task to cautiously consider the material placed before court in relation to the infringement of fundamental rights alleged by the petitioner supported by an affidavit. Therefore it is the paramount duty of the petitioner to disclose all the relevant material facts truthfully. These petitioners have failed and neglected to tender a material document, namely his application for the post of registrar, to court. On a consideration of all the material the court holds that this was a deliberate suppression and there has been no complete disclosure.

In view of the reasons discussed above I uphold the preliminary objections raised by the respondents on the basis that the petitioners have failed to comply with the mandatory provisions contained in Article 126(2) of the Constitution and on the ground that the petitioners have misrepresented and suppressed material facts to court and failed to observe the doctrine of *uberrima fides*. I dismiss the application *in limine*. No costs.

TILAKAWARDENE J – I agree

DEP PC J – I agree

Application dismissed.

LUCKMANJEE VS. DIAS

COURT OF APPEAL
ABDUS SALAM. J.
CA 606/99 [F]
DC COLOMBO 17396/L
MARCH 26, 2012

Rei Vindication action – Subject matter vested in Commissioner of National Housing? – Proof of same – Admission of ownership – Relevancy – Burden of proof? – Misdirection?

The plaintiff –appellant sought a declaration of title to the corpus and ejectment of the defendants therefrom. The defendant whilst denying the matters urged, pleaded that the subject matter was vested in the Commissioner of National Housing [CNH] in terms of a Gazette Notification and that the CNH has transferred the land in his favour. The trial Court held with the defendant, holding that the plaintiff had not established his title.

Held:

(1) The trial Judge has failed to take into consideration the 4th admission recorded which invariably should have led to the conclusion that the plaintiff was the owner of the premises in suit prior to 13.1.1974.

The trial Judge has totally disregarded the admission of ownership of the plaintiff.

(2) The defendant has failed to prove the documents on which he relied to establish that the property in question has vested in the Commissioner.

(3) In the teeth of the admission of ownership the plaintiff is entitled to obtain a declaration that she sought.

Per Abdus Salam. J

"It appears to me that the learned District Judge has misdirected himself with regard to the burden of proof and such misdirection has ended

up in a travesty of justice – since the misapplication of the law has culminated in such a miscarriage. I consider it a paramount duty. arising from the appellate jurisdiction of this Court to set aside the impugned judgment ....."

APPEAL from a judgment of the District Court of Colombo.

Case referred to :-

Siyaneris vs. Jayasinghe 52 NLR 289

Romesh de Silva PC with *Geethaka Gunawardane* for plaintiff-appellant.

D.M.G. Dissanayake for defendant-respondent.

September 11, 2013

ABDUS SALAM, J.

The plaintiff-appellant (hereinafter referred to as the "plaintiff") filed action against the defendant-respondent (hereinafter referred to as the "defendant") seeking inter alia a declaration of title to the property morefully described in schedule 2 to the plaint, ejectment of the defendant therefrom and damages as prayed for in prayer 'c' to the plaint. The defendant in his answer denied the averments in the plaint and pleaded that the subject matter of the action had vested in the Commissioner of National Housing by operation of the Ceiling on Housing Law No 1 of 1973, in terms of the Gazette notification referred to in the answer. He further averred that the Commissioner of National Housing by deed No 16540 dated 14 October 1995 transferred the land and premises in question in his favour. Nevertheless, the defendant did not seek a declaration of title in the answer. At the commencement of the trial the following admissions were recorded, to wit that. . .

1. the defendant is in possession of the subject matter of the action more fully described and set out in schedule 2 to the plaint.

2. the defendant claims title to the said premises described in schedule 2 to the plaint.

3. the court is vested with jurisdiction to adjudicate on the dispute.

4. the plaintiff was the owner of the subject matter of the action prior to 13 January 1974.

The plaintiff gave evidence and closed her case producing two documents marked as P1 and P2. The defendant also testified in presenting his case and marked three documents as D1, D2 and D3 subject to proof. When the case of the defendant was closed the learned President's Counsel for the plaintiff insisted on the proof of D1 to D3 which had been allowed to be produced subject to proof. Yet, the defendant took no steps to prove them. By judgment dated 23 July 1999 the learned Additional District Judge dismissed the plaintiff's action. This appeal has been sought by the plaintiff.

Noticeably, the dismissal of the action was on the premise that the plaintiff had failed to establish her title. One of the arguments advanced on behalf of the plaintiff was that by reason of the admission relating to the ownership of the premises in suit prior to 13 January 1974, had not been properly considered by the trial Judge. The learned President's Counsel urged with much emphasis that had the trial Judge properly adverted to the admission of ownership of the plaintiff, he ought to have decided the case in favour of the plaintiff. Consequently, he submitted that the trial Judge has erred in

dismissing the plaintiff's action. Further the learned Presidents Counsel strenuously argued that the learned Additional District Judge has misinterpreted and misapplied the ratio in the judgment of *Siyaneris vs. Jayasinghe*[1] to the facts and circumstances of the present case. He further urged that the Additional District Judge had erred in holding that the property in question had vested with the Commissioner of National Housing for reasons inter alia that a property according to law normally vests in the Commissioner of National Housing by operation of the Ceiling on Housing Property Law and not by a notification appearing in the Gazette.

The Commissioner of National Housing was not called as a witness to prove the documents marked in evidence by the defendant and the plaintiff's evidence as to the fact that the property in question had not vested was not contradicted by evidence to the contrary.

. At this stage, it is quite appropriate to refer to the unqualified admission made by the parties, prior to the commencement of the argument of this appeal. As it appears from the minute dated 28.11.2012, it is admitted by the parties that the Court of Appeal has by its judgment dated 15 October 2004 quashed the determination made by the Commissioner of National Housing vesting the property in question.

In the case of *Siyaneris vs. Jayasinghe (supra)* it was held that in a declaration of title to a property where the legal right is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant. On a close scrutiny of the reason adopted in the judgment, it appears that the learned District Judge has failed to take into consideration the 4th admission recorded between the parties which invariably should have led to the conclusion that the plaintiff was the owner of the premises in suit prior to 13.1.1974.

In the impugned judgment at page 5 the learned District Judge has totally disregarded the admission of ownership of the plaintiff, by his erroneous finding that the defendant had never admitted the ownership of the plaintiff of the subject of the action. For purpose of ready reference the said statement made by the learned District Judge in the judgment is produced hereunder.

> නමුත් මෙම නඩුවේ කිසිදු අවස්ථාවක පැමිණිලිකාරියට මෙම ස්ථානය අයිති වූ බව විත්තිකරු විසින් පිලිගෙන නැත.

As a matter of law, the plaintiff need not have proved anything by reason of the admission. Thus the learned District Judge had erred in law when he held that the plaintiff had failed to prove her title to the premises in suit. I am in total agreement with the learned President's Counsel that the learned District Judge had failed to take into consideration the admission of ownership of the plaintiff, which admission if the District Judge had properly taken cognizance would not have resulted in his having placed the plaintiff under a duty to establish the title, despite the said admission.

As has been urged on behalf of the plaintiff the learned Additional District Judge had also erred in holding that the property in question had vested with the Commissioner of National Housing, as a property vests in the Commissioner of National Housing in terms of the Ceiling on Housing Property Law by operation of law and not by virtue of the notification published in the gazette.

Another important observation, I am bound to make at this stage is that the defendant has failed to prove the documents on which he relied namely D1, D2 and D3 by calling

the National Housing Commissioner or a representative to establish that the property in question had vested with the Commissioner of National Housing. As the defendant has failed to establish this assertion, in the teeth of the admission of ownership, the plaintiff is entitled to obtain a declaration that she has sought.

It is to be observed that the plaintiff as the petitioner in C.A writ application No 233/94 has sought a writ of certiorari to quash the order dated 17 October 1979 and 31 December 1979 or any other orders that might have been made under the Land Acquisition Act in respect of the premises bearing Assessment No 56 which is the subject matter of this action and in the alternative a writ of *mandamus* directing the Honourable Minister of Land and Land Development to direct the premises No 56 and 60, Sri Sangaraja Mawatha, under Section 30(a) of the Land Acquisition Act and to restore the petitioner to possession and a writ of certiorari to quash the certificate dated 17 February 1979 issued under the Section 49 of the National Housing Act No 37 of 1954 by the Minister of National Housing and Construction and a writ of *mandamus* directing the 3rd respondent namely the Minister of Housing and Construction to restore the petitioner to possession of the said premises and a writ of mandamus directing the 4th respondent the National Housing Development Authority to vacate the said premises, remove any encumbrances, and to restore the petitioner to possession of the said premises.

The aforesaid writ application having been taken up for argument in which the State had been represented by Mr Mohan Pieris, Senior State Counsel (as he then was) this court decided that the acquisition was not *bona fide* in the lawful exercise of the powers vested in the Minister. It was further

held in that case that if the land was genuinely acquired for a public purpose as stated in the order and certificates, it should have been made use of by the State for the object or other public purposes during the 15 years that lapsed since the acquisition. In the circumstances, the Court of Appeal allowed the application and granted the petitioner in that case, namely the appellant in this case the reliefs prayed for in paragraph 1 of the prayer to the petition.

Taking into consideration the evidence of the plaintiff the documents produced by her and the admission No 4, the learned District Judge should have declared the plaintiff as the owner of the subject matter of the action on the strength of the ratio in the case of *Siyaneris (supra).*

As such, it appears to me that the learned District Judge has misdirected himself with regard to the burden of proof and such misdirection has ended up in a travesty of justice. Since, the misapplication of the law has culminated in such a miscarriage, I consider it a paramount duty, arising from the appellate jurisdiction of this court to set aside the impugned judgment and grant the plaintiff the reliefs prayed for in the amended plaint dated 11 July 1997 save and except the prayer c to the plaint.

Consequently, I direct that judgment be entered for the plaintiff as prayed for in paragraphs a, b and c of the prayer to the amended plaint dated 11 July 1997. Subject to the above, the appeal is allowed and the impugned judgment set aside.

The plaintiff is entitled to the costs of this appeal.

Appeal Allowed

THE SUPERINTENDENT, STAFFORD ESTATE AND TWO OTHERS V. SOLAIMUTHU RASU

SUPREME COURT
MOHAN PIERIS, P.C. CJ,
SRIPAVAN, J AND
WANASUNDARA, P. C. J.
S.C. APPEAL NO. 21/13
S. C. SPL LA 203/12
CA/PHC/APPEAL NO. 37/2001
HC/CP/CERTI 42/97
JULY 11TH 2013 AND
JULY 17TH 2013

State Lands (Recovery of Possession) Act No. 7 of 1979 – Application of the Act to all State lands – Unauthorized possession or occupation by any person of any state land deemed to be subject to the provisions of the Act – Writ jurisdiction in respect of the State Lands (Recovery of Possession) Act – Powers conferred on the Provincial Councils in exercising land powers and its limitations - Omne maus continent in seminus.

The 2nd Petitioner, the Competent Authority, initiated proceedings in the Magistrate Court to recover a State Land in respect of an illegal occupation, in terms of the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979. The Petitioner – Appellant – Respondent (Respondent) filed an application in the High Court praying for a Writ of Certiorari to quash the quit notice. the 2nd Petitioner filed statement of objection and raised the following preliminary objections: inter alia,

(a) The said land is a State Land

(b) The 2nd Petitioner, as the duly designated Competent Authority in terms of the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 issued quit notice dated 07.10.1997 to the Respondent by virtue of Section 3 of the said Act;

(c) Thus the Respondent has no legal basis to invoke the Writ Jurisdiction of the Provincial High Court.

(d) The High Court has no jurisdiction to hear and determine the matter as the subject of the action pertains to State Lands, which do not fall within the Provincial Council list.

The Provincial High Court held that it had no jurisdiction to hear and determine the application and upheld the preliminary objection. The Respondent thereafter preferred an appeal to the Court of Appeal. The Court of Appeal concluded that State Land becomes the subject of the Provincial Council.

The Petitioner preferred this appeal to the Supreme Court from the aforesaid judgment of the Court of Appeal and all counsel agreed to make their submissions only on the following question of law:

"Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?"

Held:

(1) State Land continues to be a subject located in the Center.

Per Mohan Peiris P.C., CJ –

". . . . Having regard to the fact that in a unitary State of Government no cession of dominium takes place, the Centre has not ceded its dominium over State Lands to the Provincial Councils except in some limited circumstances. . . ."

(2) When the State makes available to every Provincial Council, State Lands within the Province required by such council for a Provincial Council subject, the Provincial Council shall administer, control and utilize such State Land, in accordance with the laws and statutes governing the matter.

per Mohan Pieris, PC, CJ. ...

"Provincial Councils in exercising" rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and improvement" to the extent set out in Appendix II (conferred by List 1) are limited to administering, controlling and utilizing such State Lands as are given to them." In terms of article 1.2 State Land is made available to the Provincial Council by the Government. In the background of this Constitutional arrangement it defies logic and reason to conclude that State Lands is a Provincial Council subject in the absence of a total subjection of State Lands to the domain of Provincial Councils."

(3) The power of the President to alienate or dispose of State Land in terms of Article 33(d) of the Constitution and other written laws remains unfettered.

(4) Article 154(G)(7) of the Constitution provides that a Provincial Council has no power to make statutes on any matter set out in List II (Reserved List). One of the matters referred to in that List is "State Lands and Foreshore" except to the extent specified in item 18 of List 1. Thus, it is within the legislative competence of Parliament to enact laws in respect of "State lands" bypassing the powers assigned with Provincial Councils. The Provincial Councils are also expressly debarred from enacting statutes on matters coming within the purview of the Reserved List.

(5) Provincial Council subject matter in relation to State Lands would only mean that the Provincial Councils would have legislative competence to make statutes only to administer, control and utilize State Land, if such State Land is made available to the Provincial Councils by the Government for a Provincial Council subject.

(6) The act of the Competent Authority in issuing a quit notice for ejectment does not fall within the extents of matters specified in the Provincial Council List and therefore the Provincial High Court would have no jurisdiction to exercise Writ jurisdiction in respect of quit notices issued under the State Lands (Recovery of Possession) Act.

Cases referred to:

(1) *Magor and St. Nallons RDC. vs. Newport Corporation* (1950) 2 AER 1226, 1236

(2) *Re The Thirteenth Amendment to the Constitution* – (1987) 2 Sri L.R. 312

(3) *Weragama vs. Eksath Lanka Wathu Kamkaru Samitiya and others* (1994) 4 Sri LR 293

(4) *"Land Ownership"* (S. D. No. 26/2003 – 36/2003). - Considered

(5) *Vasudeva Nanayakkara v. Choksy and others* (John Keels Case) – (2008) 1 Sri LR 134- Considered

(6) *S. P. Gupta v. Union of India* – AIR 1992 SC 140

APPLICATION for Special Leave to appeal from the judgment of the Court of Appeal.

Manohara de Silva, P.C. with *Palitha Gamage* for the 1st Respondent-Respondent – Petitioner

Gomin Dayasiri with *Palitha Gamage* and *Ms. Manoli Jinadasa* and *Takitha Abeygunawardene* for the 2nd Respondent-Respondent-Petitioner

Y.J.W. Wijayathileke, P.C., Solicitor General with *Vikum de Abrew S.S.C, and Yuresha Fernando, SC* for the 3rd Respondent-Respondent-Petitioner

M. A. Sumanthiran with *Ganesharajah* and *Rakitha Abeysinghe* for the Petitioner - Appellant -Respondent.

Cur.adv.vult

September 26, 2013.

MOHAN PIERIS, PC CJ

This is an application for special leave to appeal from the judgment of the Court of Appeal dated 08.08.12 wherein the Court of Appeal set aside the judgment of the Provincial High Court dated 25.10.2000. I have read in draft the judgment of my brother Sripavan J and while I agree with his reasoning and conclusion on the matter, I would set down my own views on the question of law before us.

The instant application before us raises important questions of law and at the inception of the judgment it is pertinent to observe that the Respondent-Respondent-Petitioner (hereinafter called and referred to as "Petitioner") obtained special leave from this Court on the following two questions-

(i) Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?